

In the Matter of the Compensation of  
**NATHANIEL F. TABER, Claimant**

WCB Case No. 15-04835

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fisher's order that set aside its denial of claimant's injury claim for a right elbow condition. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant worked as a machine operator for employer. (Tr. 4-5). On or about August 3, 2015, he scraped his right elbow clearing a cardboard jam out of a machine resulting in a small abrasion. (Tr. 5). Two days later, his elbow became swollen and painful. (Tr. 5). That same day, he bumped his elbow on a machine at work and experienced severe pain. (Ex. 1A-2).

Claimant then sought treatment from Dr. Young, explaining that he thought he had an infection. (Ex. 1A-5). Dr. Young noted a superficial abrasion on the right elbow with 3 cm of surrounding erythema, reporting that "[t]he patient noticed some pain in his right elbow earlier in the day, then bumped it at work tonight and over the last several hours has developed worsening pain." (Ex. 1A-2-3). Dr. Young diagnosed cellulitis and prescribed antibiotics. (Ex. 1A-4).

When claimant's elbow condition did not improve, he was referred to Dr. Patillo for a consultation regarding irrigation and debridement. (Ex. 16). Dr. Patillo believed that surgical treatment was necessary. He observed a small abrasion over the posterior aspect of the elbow and reported the following history: "[Claimant] reports suffering a minor abrasion to his right posterior elbow approximately 4 days ago. Two days later, began to notice progressive erythema, pain, and swelling about the posterior aspect of his elbow." (Ex. 16-1). On August 12, 2015, Dr. Patillo performed the surgery, diagnosing right septic olecranon bursitis. (Ex. 17).

On September 23, 2015, Dr. Burton evaluated claimant on behalf of the employer. (Ex. 24). Claimant reported to Dr. Burton that "he was pulling out boxes that had been jammed into the machine and scraped the back of his elbow."

Claimant also described seeking medical care after “banging” his elbow on the same machine two days later. (Ex. 24-3). Although confirming Dr. Patillo’s diagnosis of septic bursitis, Dr. Burton considered it unlikely that the condition developed in two days from a small abrasion on claimant’s arm. (Ex. 24-8). Dr. Burton noted that claimant failed to cooperate with the examination, reasoning that, although he disclosed that he had two prior DUI convictions and used marijuana, he had not disclosed an additional conviction for possession of methamphetamine and a Hepatitis C diagnosis. (Ex. 24-4, -6, -8). Accordingly, Dr. Burton was skeptical that an injurious work event had occurred. (Ex. 24-6, -8).

On October 5, 2015, the employer denied the claim. Claimant requested a hearing.

The ALJ concluded that claimant sustained a compensable right elbow injury, finding that he had established that he scraped his elbow on the machine at work on August 3, 2015. In reaching that conclusion, the ALJ found that claimant was a credible witness based both on his demeanor, as well as the consistency between his testimony and the mechanism of injury reported in the medical records.

On review, the employer contends that claimant’s testimony was not credible. In doing so, the employer asserts that he was not forthright about his past medical and substance abuse issues with the medical providers. In particular, the employer refers to claimant’s failure to disclose to Dr. Burton all of his criminal convictions, his drinking beer on his lunch break on the day he reported his injury, an accusation that he sexually harassed a fellow employee on the day he reported his injury, his past drug use, and his Hepatitis C diagnosis.

Based on the following reasoning, we affirm the ALJ’s decision.

Claimant must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer’s Co-op Creamery*, 53 Or App 618, *rev den*, 291 Or 893 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff’d without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant’s condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003).

Whether claimant established legal causation hinges principally on his credibility/reliability. In determining the credibility of a witness’s testimony, we normally defer to an ALJ’s demeanor-based credibility finding. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991).

Here, the ALJ found that claimant was a credible witness, based partially on his demeanor as a witness. We defer to such a finding unless inconsistencies in the record raise such doubt that we are unable to conclude that material testimony is reliable. *Kenneth J. Sinor*, 68 Van Natta 113, 115 (2016); *George V. Jolley*, 56 Van Natta 2345, 2348 (2004).

As an initial matter, we note that claimant's DUI and drug possession convictions, his beer consumption on his lunch break, the sexual harassment allegation, and his Hepatitis C diagnosis do not contradict his description of a work-related injury incident which resulted in his need for treatment for his right elbow condition. To the contrary, claimant's version of the work event has been consistently reported from the outset. Moreover, the examinations performed by Dr. Young and Dr. Patillo confirmed the presence of a scraped right elbow consistent with claimant's description of the work incident.

The employer's contentions focus on claimant's veracity as a witness and reliability as a historian. Specifically, the employer argues that claimant's alleged dishonesty with Dr. Burton reveals inconsistencies in his statements and renders his testimony unreliable. Yet, the record does not indicate that claimant made any untruthful or inconsistent statement concerning his DUI convictions, his beer consumption on his lunch break, and the sexual harassment allegation. To the contrary, claimant disclosed his DUI convictions to Dr. Burton. (Ex. 24-4). Moreover, there is no indication that Dr. Burton's examination included questions regarding his lunch break activities on the day he reported his work incident or any sexual harassment allegations. Finally, when questions were raised concerning the latter issues, claimant addressed them in his testimony. (Tr. 14, 20, 21). Under such circumstances, the absence of a discussion of claimant's lunch break conduct and harassment allegation in Dr. Burton's report does not cause us to question claimant's reliability as a historian and credibility as a witness when it comes to the injury.

Claimant admits that he did not disclose his entire history to Dr. Burton (*i.e.*, his prior drug use and his Hepatitis C diagnosis), explaining that he was "downplaying it a bit." (Tr. 14). Nonetheless, for the reasons discussed above (particularly considering the ALJ's "demeanor-based" credibility finding, which necessarily includes claimant's explanation for "downplaying" his past behavior and Hepatitis C diagnosis), we do not find claimant's acknowledged omissions sufficient to outweigh his consistent description of his work incident and the onset of his right elbow condition to his examining/treating physicians, as well as at the hearing. Furthermore, to the extent that claimant's "downplaying" suggests a

lack of credibility, it does not rise to a level that casts doubt on the remainder of his credible testimony. *Westmoreland v. Iowa Beef Processors*, 70 Or App 642, 645-46 (1984), *rev den*, 298 Or 597 (1985); *Carl R. Mathiason*, 68 Van Natta 1127, (2016) (“[E]ven if a claimant lacks credibility or reliability in certain respects, he can still prove compensability if the remainder of the record supports the claim.”).

In summary, based on the aforementioned reasoning, as well as the reasons expressed in the ALJ’s order, we are persuaded that claimant’s condition is compensable. Consequently, we affirm.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on review is \$5,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s briefs, his counsel’s submission, and the employer’s objection), the complexity of the issue, the value of the interest involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers’ compensation.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of the right elbow condition, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ’s order dated March 25, 2016 is affirmed. For services on review, claimant’s attorney is awarded an assessed fee of \$5,000, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of the right elbow condition, to be paid by the employer.

Entered at Salem, Oregon on November 7, 2016